

**Office of Chief Counsel  
Internal Revenue Service  
memorandum**

CC:PA:01:CAMcGreevy  
POSTS-140438-08

date: October 14, 2009

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Subject: Zero-Net Rate netting questions

This Program Advice responds to your request for assistance. This advice may not be used or cited as precedent.<sup>1</sup>

We received several questions originating from the Service Wide Interest Program concerning how the Service should proceed when the Service receives requests for zero-rate interest netting under section 6621(d) of the Internal Revenue Code that contain one or more tax periods for which the liability for the tax period has not been resolved at the time the claim or request is filed.<sup>2</sup> Specifically:

1. Are requests for zero-rate interest netting (zero-rate netting) that include one or more tax periods for which the liability for the tax year has not yet been resolved (unresolved periods) premature and is the Service legally required to accept them?

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<sup>1</sup> Please seek Counsel advice before disseminating this memorandum. Ensure that the discussions that follow the heading Case Development, Hazards, and Other Considerations are redacted.

<sup>2</sup> There is a legal difference between a "claim" for zero-rate netting and a "request" for zero-rate netting. For purposes of this memorandum, the term request will be used to refer to both unless otherwise indicated. It should be noted that any unresolved period would necessarily involve a "request" (for the unresolved period) because the relevant interest could never be paid or allowed when the principal has not yet been determined. Some of the periods contained in the request, however, could be paid or allowed and could potentially be treated as a claim subject to the formal disallowance procedures of section 6532.

2. How should the Service treat these requests?
3. If a taxpayer has previously submitted a zero-rate netting request that includes an unresolved period, may the taxpayer amend the request to remove the unresolved period and ask the Service to process the remaining periods? If so, what is the effect on the remaining periods?

## CONCLUSIONS

1. Requests for zero-rate interest netting that include unresolved periods are legally premature. A taxpayer is not entitled to zero-rate interest netting prior to the time an underpayment or overpayment upon which interest may be computed is determined. As such, the Service is not legally required to accept them.
2. Given the collateral problems that occur when the Service accepts and suspends premature requests, until the time that further guidance is published, to ensure consistency among similarly situated taxpayers we recommend [REDACTED]  
[REDACTED] The Service may legally process any resolved periods that include interest that are appropriate for netting.
3. A taxpayer may amend a request for zero-rate netting to remove an unresolved period without any effect on the remaining periods, subject to the consequences discussed below in Hazards. This request should be in writing until further guidance is published.

## FACTS

The facts as we understand them are as follows. The Service receives requests to net overpayment and underpayment interest rates to zero for overlapping periods and amounts of underpayments and overpayments of tax by the same taxpayer. In some cases, a request for zero-rate netting will include one or more periods for which an overpayment or underpayment (upon which statutory interest is potentially payable or allowable) has not been determined at the time the claim is filed. We understand the section 6621(d) claims and requests at issue are for interest accruing on or after October 1, 1998.

## LAW AND ANALYSIS

Section 6621(d) provides that, to the extent that for any period interest is payable under subchapter A (sections 6601 and 6602) and allowable under subchapter B (section 6611) on equivalent underpayments and overpayments of tax by the same taxpayer imposed by the Code, the net rate of interest under section 6621 on the amounts is zero for the period.

Rev. Proc. 2000-26, 2000-1 C.B. 1257, provides guidance regarding the application of section 6621(d) to interest accruing on or after October 1, 1998. Section 6621(d) provides for a net interest rate of zero to the extent of overlapping tax underpayments and tax overpayments, and generally applies to interest for periods beginning after July 22, 1998 (i.e., interest accruing on or after October 1, 1998).<sup>3</sup> This is the latest published guidance concerning netting.

Zero-rate netting under section 6621(d) is available only when there exist overlapping periods of overpayment and underpayment upon which interest is both payable and allowable. The mechanics of the computation require that the interest on the overpayment and the interest on the underpayment be netted to arrive at net rate of zero for any period during which the overpayment and the underpayment by the same taxpayer overlap. Prior to the time an overpayment or underpayment is determined for a tax period, there is no principal upon which interest can be computed and a request for zero-rate netting is premature. A threshold requirement of section 6621(d) is that underpayment interest is "payable" and overpayment interest is "allowable." If interest is not "payable" or "allowable," then it is not interest as described in section 6621(d). Shriners Hosp. for Crippled Children v. United States, 862 F.2d 1561, 1563 (Fed. Cir. 1988) ("Tax and interest payments are creatures of statute, and such statutory provisions are to be given their plainest reasonable meaning, in implementation of the discernible intent of Congress.").

It has been suggested that section 5.06 of Rev. Proc. 2000-26 "requires" the Service to accept unresolved periods in a request for netting. The section specifically states that no Form 843 is required when a computation of interest using the net interest rate of zero under section 6621(d) for interest accruing on or after October 1, 1998, is requested by a taxpayer in connection with a return (or returns) of the taxpayer under consideration by any function of the Service (including Examination, Appeals, or a case before a federal court that requires a computation of interest by any function of the Service). Rather than filing a Form 843, the taxpayer should provide the contact representative of the function a letter or written statement that includes specifically listed information.<sup>4</sup> The revenue procedure places no stated limits on the availability of the

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<sup>3</sup> Rev. Proc. 99-43, 1999-2 C.B. 579, which modified and superseded Rev. Proc. 99-19, 1999-1 C.B. 842, provides guidance on the conditions applicable to requests for the application of a net interest rate of zero to interest accruing before October 1, 1998 (Special Rule). The underlying requests addressed in this memorandum deal only with interest accruing on or after October 1, 1998. Requests under the Special Rule are less complex, however, because taxpayers are required to file a claim with the Service to receive the special treatment.

<sup>4</sup> The taxpayer is asked to provide a written statement that (1) states that the taxpayer is requesting the net interest rate of zero under section 6621(d); (2) indicates the type of tax and type of return that affects the interest computation for the taxable period under consideration; (3) states when and for what period(s) the refund or payment (that affects the interest computation for the taxable period under consideration) was made; and (4) states that, to the extent of equivalent amounts of overpayment or underpayment, the period(s) set forth under section 5.06 (3) of the revenue procedure has (have) not

alternative process.

We do not agree with the suggestion that section 5.06 requires the Service to accept premature requests, and we decline to interpret the revenue procedure in that way. Section 5.06 was merely intended to excuse a taxpayer that was in a continuing relationship with the Service from being required to use a specified form.<sup>5</sup> It was in no way intended to enlarge the rights of taxpayers or to permit taxpayers to circumvent the applicable periods of limitation. This is particularly relevant given that the Government has successfully litigated that both applicable periods of limitation must be open when a request for netting is made and that the number of cases that would have to be suspended has been found to be exponentially larger than might have been anticipated. It runs counter to common sense to administratively undermine what was successfully obtained in litigation and which now appears to be getting out of control.

Moreover, section 3.02 of the revenue procedure specifically provides that it does not apply to “an overpayment or underpayment for any period during which interest on the overpayment or underpayment is not allowable or payable by law (e.g., the 45-day interest disallowance rule under § 6611 (e)).”<sup>6</sup> It is more than reasonable to argue that prior to the completion of an examination, interest is neither allowable nor payable because the principal has not been determined. Despite section 5.06 of the revenue procedure, nothing precludes the Service from returning a premature request to the taxpayer, even while an examination is underway. The revenue procedure does not authorize the acceptance of premature requests; it merely simplifies the steps to be taken when a period is near resolution. Whether and to what extent a period under examination may be considered in a request for zero-rate netting is an appropriate subject for future published guidance.

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previously been applied to obtain a net interest rate of zero under section 6621(d). These items, plus more, are also requested for requests made on Form 843. See section 5.04 of the revenue procedure.

<sup>5</sup> This was recognized by the Court of Appeals for the Federal Circuit in that under the Special Rule, discussed in Rev. Proc. 99-43, “[the revenue procedure] simply provides that in certain circumstances a letter or written statement making the request for retroactive application can be submitted in place of a specific form.” See FleetBoston Fin. Corp. v. United States, 483 F.3d 1345 (Fed. Cir. 2007). There is little reason to interpret Rev. Proc. 2000-26 differently.

<sup>6</sup> An obvious situation in which zero-rate netting is inapplicable is when the Service exercises its authority under section 6402 to satisfy an outstanding liability with an overpayment for which one or both has been included in a netting request. The Service will first apply section 6402, computing interest under the provisions of section 6601(f) rather than section 6621(d). This procedure has been accepted by at least one court. See General Electric Co. v. United States, 87 Fed. Cl. 221 (Ct. Cl. 2009). Moreover, Congress has indicated that in situations in which interest is both payable and allowable by the same taxpayer for the same period, the Secretary will take all reasonable steps to offset the liabilities, rather than process them separately using the net interest rate of zero under section 6621(d). See H.R. Conf. Rep. No. 599, 105th Cong. 2d Sess. 257 (1998). See also section 2.04(2) of Rev. Proc. 2000-26. This further reduces the possibility that interest on unresolved periods will eventually be available for zero-rate netting and could result in the Service suspending these premature requests for no valid reason.

Finally, the revenue procedure presumes, at most, that there would be only one unresolved period. See section 5.06(3). This section lists as necessary information to be included in a written statement in lieu of a Form 843 as much information as would be otherwise available, including when and for what period(s) the refund or payment (that affects the interest computation for the taxable periods under consideration) was made and whether the interest was used in another netting request.

There is no legal requirement that a taxpayer file a claim before being entitled to the treatment afforded by section 6621(d). To accommodate the Service's inability to automatically zero-rate net, until the time that the Service can automatically implement section 6621(d), taxpayers have been asked to submit a request to identify necessary information concerning the tax periods overlapping periods of overpayments and underpayments. See Sec. 2.04(4) of Rev. Proc. 2000-26. See also, H. R. Rep. No. 364 (Part 1), 105th Cong., 1st Sess. 64 (1998); S. Rep. No. 174, 105th Cong., 2d Sess. 62 (1998).

We understand that the Service has thus far developed a conservative approach for processing zero-rate netting requests.<sup>7</sup> Apparently, some requests for zero-rate netting were not treated as claims for refund by the Service but instead were considered merely requests. Others, when full paid, were treated as subject to notices of claim disallowance under section 6532. No particular treatment is legally required; however, the Service must ensure consistency among similarly situated taxpayers.

Finally, we have identified no legal impediment to allowing a taxpayer to remove unresolved periods from a request for zero-rate netting. The initial request, assuming all applicable periods of limitation are open at the time of the request, will retain its timeliness, need not be withdrawn in its entirety, and will not result in a later "request" date. The removed period, however, would be entitled to zero-rate netting only if the applicable period of limitation was open at the time it was resubmitted to the Service in a new zero-rate netting request. The new request would reflect a new receipt date for purposes of determining timeliness. Once an unresolved period is removed from the initial request, a taxpayer has no legal right to have the removed period later considered with the initial request and may not ask the Service to "undo" the initial request to achieve a more favorable result.

## CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

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<sup>7</sup> The Service has essentially three options when processing the premature requests. [REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED]

Legality:

While this response states that there is no legal prohibition against accepting premature claims, this statement may not survive challenge. The strict statutory language is at odds with the taxpayer-favorable ameliorative effect of netting. While the Service has the authority to do what is administratively necessary to enforce the laws as written, the Service is also charged with the duty to pay only what is legally required. [REDACTED]

[REDACTED]

Since the Service is not yet able to automatically zero-rate net, existing published guidance provides procedures to follow. See sec. 2.04(4) of Rev. Proc. 2000-26. Note that Congress may lose patience since it's been 10 years since the provision was enacted. However, the Service can still not systemically process requests for zero-rate netting. Until the time it can be automatically accomplished, taxpayers are required to

identify the overlapping periods and amounts and to certify that the interest has not been used in another netting computation. It is impossible to do so when the period is not resolved.

Footnote 2 (in text):

[REDACTED]

[REDACTED]

[REDACTED]

### Consistency

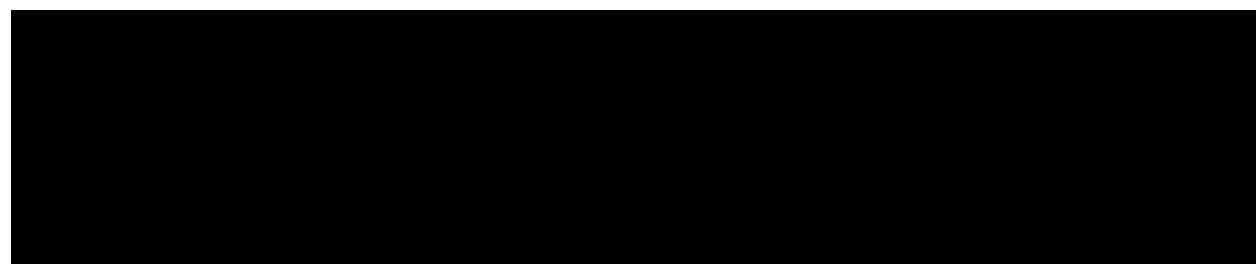
We understand that IRM 4.10.26 was developed by a joint task force including members from many affected offices in an attempt to address some of the emerging netting issues. The procedures contained in that IRM were developed out of administrative necessity and reflect how at least some of the responsible functions are currently processing zero-rate netting requests. While members of Chief Counsel were involved in the task force, we have not been able to locate anything that indicates that the IRM was officially signed off or approved by Counsel.

IRM 4.10.26 provides net rate netting procedures for LMSB cases.<sup>8</sup> IRM 4.10.26.1(1)

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<sup>8</sup> It is worth noting that as a general rule, provisions within the Internal Revenue Manual are not binding on the IRS and convey no rights to taxpayers. See First Fed. Sav. & Loan Association of Pittsburgh v. Goldman, 644 F. Supp. 101, 103 (W.D.Pa. 1986). See also United States v. Lockyer, 448 F.2d 417, 421

specifically states that the procedures do not apply to net rate netting requests worked in case processing units. There is a potential for disparate treatment depending on which Service function handles the request since it is unclear whether similar procedures are used in case processing units.



. Every attempt should be made to achieve consistent treatment in the interim.

#### Taxpayer involvement in the actual zero-rate netting computation

We understand that often unresolved periods are included in a general request for netting with periods that are already resolved. Taxpayers, wanting to maximize the elimination of the rate differential may include unresolved periods for which they anticipate a larger differential than those that are resolved at the time the request is submitted. They may also desire to submit actual interest computations or have detailed involvement in (and perhaps veto-power over) Service computations.

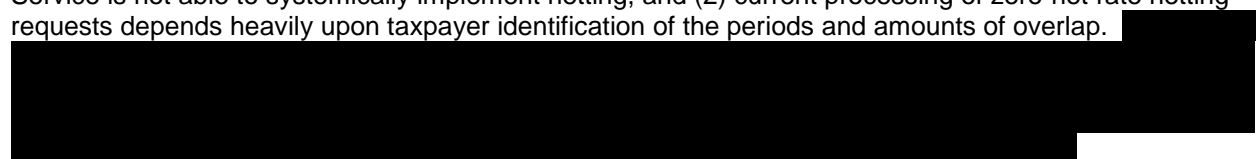
While the current revenue procedures request taxpayers to identify the periods and amounts of overlap, there is no legal requirement that the Service permit a taxpayer to have input into the actual computation or the selection of periods to be netted against each other.<sup>9</sup> Thus, there is no legal impediment to the Service processing the resolved portions of a netting request without further involvement by the taxpayer after the unresolved periods have been disallowed or returned as premature.

We understand that the government appears to have been accepting computations by the taxpayer as to the netting figures the taxpayers suggest. Nothing in the revenue procedures or the statute, however, suggests that a taxpayer has an absolute right to

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(10th Cir. 1971); and Wheeler v. Commissioner, 91 T.C.M. (CCH) 1194, at \*3 n.9 (2006) (noting that the manual "was designed to aid in the internal administration of the Internal Revenue Service, not for the protection of taxpayers; thus, it is not binding upon and confers no rights to taxpayers").

<sup>9</sup> The current revenue procedure and the legislative history discussed herein acknowledge that (1) the Service is not able to systemically implement netting, and (2) current processing of zero-net rate netting requests depends heavily upon taxpayer identification of the periods and amounts of overlap.





tell the Service how to perform a zero-rate netting computation. Although the government should commit to maximizing the effect of the zero-rate netting, the Service is under no legal obligation to accept the figures the taxpayer presents. So while the Service may consider further input from the taxpayer after unresolved periods are removed, the Service is not required to do so when working with the remaining resolved periods.



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